Filed 8/20/19 P. v. Carazolez CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MATTHEW JOHN CARAZOLEZ, Defendant and Appellant.	F075862 (Super. Ct. No. PCF302083) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Antonio A. Reyes, Judge.

Law Office of Nicco Capozzi and Nicco Capozzi for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Melissa Lipon, Deputy Attorneys General, for Plaintiff and Respondent.

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PROCEDURAL HISTORY

Defendant Matthew John Carazolez was involved in a solo motorcycle crash. His passenger, who was not wearing a helmet, suffered grave injuries that left her in a paralyzed and permanent vegetative state. Defendant was charged with driving under the influence of alcohol and causing bodily injury to another (Veh. Code, § 23153, subd. (a)) (count 1); driving with a blood alcohol level of 0.08 percent or more and causing bodily injury to another (Veh. Code, § 23153, subd. (b)) (count 2); and driving while under the combined influence of alcohol and drugs and causing bodily injury to another (Veh. Code § 23153, former subd. (f)) (count 3).[1] As to each count, the charging document also alleged defendant inflicted great bodily injury (GBI) causing "the victim to become comatose due to brain injury or to suffer paralysis of a permanent nature …." (Pen. Code, § 12022.7, subd. (b).)[2]

Defendant pled no contest and then later withdrew that plea. Subsequently, defendant again pled no contest to the charges and the trial court sentenced him to the lower term of 16 months on count 1, with an additional five years for the GBI enhancement, for a total determinate term of six years four months. On counts 2 and 3, the court imposed the lower term of 16 months, plus an additional five years for the GBI enhancement, but stayed the sentences pursuant to section 654.

On appeal, defendant claims the People breached the first settlement agreement the parties entered into, in violation of due process; the trial court erred in considering an earlier filed statement in aggravation filed by the prosecutor formerly assigned to the

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1 With respect to count 3, defendant was charged in 2014 with driving under the combined influence of alcohol and drugs, in violation of Vehicle Code section 23153, subdivision (f). Effective January 1, 2017, the statute was amended and subdivision (f) was renumbered to subdivision (g). (Stats. 2016, ch. 765, § 2.) When defendant pled no contest to the charges and was sentenced in 2017, the parties and the court overlooked the amendment renumbering subdivision (f) to subdivision (g). As discussed in part V. of the Discussion, we will exercise our discretion to correct this technical error. (§ 1260.)

2 All further statutory references are to the Penal Code unless otherwise specified.

case, in addition to the statement in aggravation filed on the day of sentencing by the presently assigned prosecutor; the trial court erred in failing to investigate a conflict of interest arising from trial counsel's previous representation of the victim, in violation of his right to effective assistance of counsel; and trial counsel rendered ineffective assistance of counsel when he called witnesses during the sentencing hearing to testify about the victim's character.

The People argue this court lacks jurisdiction over defendant's claim of error relating to the trial court's failure to investigate defense counsel's potential conflict of interest because defendant failed to obtain a certificate of probable cause, and they otherwise dispute his entitlement to any relief on the merits of his claims.

We agree with the People that defendant's failure to obtain a certificate of probable cause bars his challenge to his conviction based on the trial court's alleged failure to investigate his counsel's potential conflict of interest and his appeal is dismissed as to that claim. (§ 1237.5; Cal. Rules of Court, rule 8.304(b)(4)(B).) We conclude defendant's other claims lack merit, but on our own motion, we correct the technical error relating to defendant's conviction on count 3 for driving under the combined influence of alcohol and drugs to reflect the correct subdivision. The judgment is otherwise affirmed.

DISCUSSION

I. Alleged Breach of Plea Agreement

A. Summary of Parties' Positions

Defendant claims that the People breached their settlement offer when they filed a statement in aggravation prior to sentencing, thereby violating his right to due process. Defendant concedes that when the trial court did not accept the proposed plea agreement, he was permitted to, and did, withdraw his original plea, but he argues that the trial court should have ordered specific performance and his conviction should be reversed.

The People respond that the prosecutor's settlement offer was expressly rejected by the trial court and due process did not require that the trial court sentence defendant to felony probation without considering the relevant circumstances. For the reasons set forth below, we agree with the People that defendant has not met his burden of demonstrating his rights were violated.

B. Procedural History

Relevant to defendant's claim that the People breached their settlement offer, the prosecutor extended the following offer to defendant: in exchange for his plea to count 2 and admission to the GBI enhancement allegation, the prosecutor would agree to a jail term between six months and one year, "dependent upon the … significant amount of restitution paid up-front," and an eight-year suspended prison sentence. During the subsequent trial confirmation hearing, defense counsel informed the trial court of defendant's willingness to accept the offer and desire to enter a plea.

However, the record reflects that the court did not accept this proposed plea bargain. The court stated it was going to refer the matter to the probation department for a full report and if it imposed a prison sentence, the sentence would be no greater than six years four months in prison. The court also stated that if it granted probation, it would impose a five-year suspended sentence with at least one year in custody. The court later stated that it would impose an eight-year suspended sentence. Defendant then pled no contest to count 2 and admitted the GBI enhancement. At defense counsel's request, the prosecutor made a record of his settlement offer, described, *ante*, and stated that because the court did not agree with the offer, the People would wait for the probation report and then argue for the sentence they deemed appropriate.

Approximately four months later, at the hearing set for sentencing, defendant withdrew his no contest plea and the matter was set for a trial setting hearing. At a subsequent hearing set for trial confirmation, held almost six months later, defense counsel informed the court that defendant intended to enter a plea to all charges. By then,

a different prosecutor was assigned to the case and she stated that there was no settlement offer from the People. The trial court informed defendant that he was free to argue for probation or the minimum term at sentencing, but the maximum "lid" was seven years—the middle term of two years plus an additional five years for the enhancement. Defendant then pled no contest to counts 1 through 3 and admitted the attached GBI enhancements.

Prior to sentencing, defense counsel filed an amended statement in mitigation and urged the trial court to accept the settlement offer that had been extended by the prior prosecutor but rejected by the court. At sentencing, the court imposed the lower term of 16 months plus an additional five years for the GBI enhancement on count 2, for a total determinate term of six years four months. Sentences on counts 1 and 3 were imposed and stayed under section 654.

C. Analysis

1. Legal Standard

Section 1192.5, addressing pleas of guilty or no contest, provides:

> "Upon a plea of guilty or nolo contendere to an accusatory pleading charging a felony, other than a violation of paragraph (2), (3), or (6) of subdivision (a) of Section 261, paragraph (1) or (4) of subdivision (a) of Section 262, Section 264.1, Section 286 or 287 or former Section 288a by force, violence, duress, menace or threat of great bodily harm, subdivision (b) of Section 288, or subdivision (a) of Section 289, the plea may specify the punishment to the same extent as it may be specified by the jury on a plea of not guilty or fixed by the court on a plea of guilty, nolo contendere, or not guilty, and may specify the exercise by the court thereafter of other powers legally available to it.
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> "Where the plea is accepted by the prosecuting attorney in open court *and is approved by the court*, the defendant, except as otherwise provided in this section, cannot be sentenced on the plea to a punishment more severe than that specified in the plea and the court may not proceed as to the plea other than as specified in the plea.
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> "*If the court approves of the plea*, it shall inform the defendant prior to the making of the plea that (1) its approval is not binding, (2) it may, at

> the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its approval in the light of further consideration of the matter, and (3) in that case, the defendant shall be permitted to withdraw his or her plea if he or she desires to do so. The court shall also cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for the plea.
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> "If the plea is not accepted by the prosecuting attorney *and approved by the court*, the plea shall be deemed withdrawn and the defendant may then enter the plea or pleas as would otherwise have been available.
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> "If the plea is withdrawn or deemed withdrawn, it may not be received in evidence in any criminal, civil, or special action or proceeding of any nature, including proceedings before agencies, commissions, boards, and tribunals."[3] (Italics added.)

With respect to plea bargains, "the process of plea negotiation 'contemplates an agreement negotiated by the People and the defendant and approved by the court. [Citations.] Pursuant to this procedure the defendant agrees to plead guilty [or no contest] in order to obtain a reciprocal benefit, generally consisting of a less severe punishment than that which could result if he were convicted of all offenses charged. [Citation.] This more lenient disposition of the charges is secured in part by prosecutorial consent to the imposition of such clement punishment (§ 1192.5), by the People's acceptance of a plea to a lesser offense than that charged, either in degree (§§ 1192.1, 1192.2) or kind [citation], or by the prosecutor's dismissal of one or more counts of a multi-count indictment or information. *Judicial approval is an essential condition precedent to the effectiveness of the "bargain" worked out by the defense and prosecution*. [Citations.] But implicit in all of this is a process of "bargaining" between the adverse parties to the case—the People represented by the prosecutor on one side, the defendant represented by his counsel on the other—which bargaining results in an agreement between them. [Citation.]'" (*People v. Segura* (2008) 44 Cal.4th 921, 929–

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3 Section 1192.5 was amended effective January 1, 2019, to reflect the renumbering of former section 288a to section 287. (Stats. 2018, ch. 423, § 87.)

930, italics added; accord, *People v. Clancey* (2013) 56 Cal.4th 562, 569–570; *People v. Martin* (2010) 51 Cal.4th 75, 79)

"Because a 'negotiated plea agreement is a form of contract,' it is interpreted according to general contract principles. [Citations.] Acceptance of the agreement binds the court and the parties to the agreement. [Citations.] '"When a guilty [or nolo contendere] plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties, including the state, must abide by the terms of the agreement."'" (*People v. Segura*, *supra*, 44 Cal.4th at pp. 930–931; accord, *People v. Martin*, *supra*, 51 Cal.4th at p. 79.)

However, "the trial court may decide not to approve the terms of a plea agreement negotiated by the parties. [Citation.] If the court does not believe the agreed-upon disposition is fair, the court 'need not approve a bargain reached between the prosecution and the defendant, [but] it cannot change that bargain or agreement without the consent of both parties.' [Citations.] [¶] Although a plea agreement does not divest the court of its inherent sentencing discretion, 'a judge who has accepted a plea bargain is bound to impose a sentence within the limits of that bargain. [Citation.] "A plea agreement is, in essence, a contract between the defendant and the prosecutor to which the court consents to be bound." [Citation.] Should the court consider the plea bargain to be unacceptable, its remedy is to reject it, not to violate it, directly or indirectly. [Citation.] Once the court has accepted the terms of the negotiated plea, "[it] lacks jurisdiction to alter the terms of a plea bargain so that it becomes more favorable to a defendant unless, of course, the parties agree." [Citation.]'" (*People v. Segura, supra*, 44 Cal.4th at p. 931; accord, *People v. Martin, supra*, 51 Cal.4th at p. 79.)

2. No Binding Plea Agreement

As defendant argues, "due process applies … to the procedure of accepting the plea" and "to implementation of the bargain itself," and "violation of the bargain by an officer of the state raises a constitutional right to some remedy." (*People v. Mancheno*

(1982) 32 Cal.3d 855, 860; accord, *People v. Walker* (1991) 54 Cal.3d 1013, 1024, overruled on another ground by *People v. Villalobos* (2012) 54 Cal.4th 177, 183.) Here, however, there was no judicial approval of the parties' bargain. (§ 1192.5; *People v. Clancey*, *supra*, 56 Cal.4th at p. 570 [judicial approval condition precedent]; *People v. Segura*, *supra*, 44 Cal.4th at pp. 930–931 [same]; *People v. Loya* (2016) 1 Cal.App.5th 932, 947 [same].)

The victim in this case was left paralyzed and in a permanent vegetative state as a result of the motorcycle crash. The maximum possible sentence was eight years in prison, and the parties' plea agreement provided for a jail sentence of between six months and one year. The court did not approve the proposed plea agreement, as it wanted to hear from the victim's family on the matter, and it instead requested a full report from the probation department and gave an indicated sentence of no more than six years four months. (*People v. Clancey*, *supra*, 56 Cal.4th at p. 576; *People v. Superior Court (Jalalipour)* (2015) 232 Cal.App.4th 1199, 1209.) Notably, defendant does not suggest the court abused its discretion in refusing to accept the parties' plea agreement. (*People v. Loya*, *supra*, 1 Cal.App.5th at pp. 946–947; *People v. Barao* (2013) 218 Cal.App.4th 769, 773; see § 1192.7, subd. (a)(2) [addressing limitation of plea bargaining for offenses involving driving under the influence of alcohol, drugs or both].)[4]

Given the court's rejection of the parties' agreement, there was no plea bargain to which the parties and the court were bound. As such, defendant's argument that the prosecutor breached the agreement by filing a statement in aggravation prior to sentencing, thereby violating his right to due process, necessarily fails.

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[4] Section 1192.7, subdivision (a)(2), provides: "Plea bargaining in any case in which the indictment or information charges any serious felony, any felony in which it is alleged that a firearm was personally used by the defendant, *or any offense of driving while under the influence of alcohol, drugs, narcotics, or any other intoxicating substance, or any combination thereof*, is prohibited, unless there is insufficient evidence to prove the people's case, or testimony of a material witness cannot be obtained, or a reduction or dismissal would not result in a substantial change in sentence." (Italics added.)

II. Lack of Jurisdiction Over Conflict of Interest Claim

During the hearing at which defendant withdrew his first plea, the trial court noted on the minute order that there may be a potential conflict of interest because defense counsel may have represented the victim. Defendant now claims the trial court erred by failing to investigate this potential conflict of interest. The People respond that this court lacks jurisdiction over the claim given defendant's failure to obtain a certificate of probable cause (§ 1237.5; Cal. Rules of Court, Rule 8.304(b)), and the claim lacks merit in any event.[5]

Section 1237.5 provides:

> "No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met:
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> (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings.
>
> (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court."

Thus, when a defendant pleads guilty or no contest, absent a certificate of probable cause, "appellate review is [generally] limited to issues that concern the 'jurisdiction of the court or the legality of the proceedings, including the constitutional validity of the plea.'" (*In re Chavez* (2003) 30 Cal.4th 643, 649; accord, *People v. Maultsby* (2012) 53 Cal.4th 296, 302–303; see *People v. Shelton* (2006) 37 Cal.4th 759, 766.)

Here, the People contend, and defendant does not dispute, that he failed to obtain a certificate of probable cause in compliance with section 1237.5. The notice of appeal form filed by trial counsel on defendant's behalf reflects that a certificate of probable

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5 Defendant did not address his failure to obtain a certificate of probable cause in his reply brief.

cause is not necessary because the appeal raises "[g]rounds that arose after the entry of the plea and do not affect the plea's validity." (Cal. Rules of Court, rule 8.304(b)(4)(B).) However, the information that defense counsel may have had a conflict of interest stemming from his prior representation of the victim was noted by the trial court at the time defendant withdrew his first no contest plea and prior to his entry into the operative no contest plea. As such, the grounds for the claim did *not* arise after the entry of the plea and they *do* relate to the validity of the plea.

In the absence of a certificate of probable cause, we lack jurisdiction over defendant's claim that the trial court erred by failing to investigate defense counsel's potential conflict of interest and we dismiss the claim. (*People v. Shelton*, *supra*, 37 Cal.4th at p. 771.)

III. Consideration of Earlier Statement in Aggravation

Following defendant's first no contest plea, the then-assigned prosecutor filed a statement in aggravation and defendant filed a statement in mitigation in advance of the scheduled sentencing hearing. Defendant subsequently withdrew that plea and later entered the no contest plea that is operative in this case. Prior to the sentencing hearing, the prosecutor filed a statement in aggravation and defendant filed an amended statement in mitigation.

In the first statement, the then-assigned prosecutor sought the upper term of three years plus an additional five years for the GBI enhancement, for a total determinate term of eight years in prison. In the second statement, the prosecutor sought the middle term of two years plus an additional five years for the GBI enhancement, for a total determinate term of seven years in prison, as recommended by the probation report. In accordance with its earlier comments, the trial court imposed the lower term of 16 months plus an additional five years for the enhancement, for a total determinate term of six years four months in prison.

In a cursory argument, defendant claims the trial court erred in considering the first statement in aggravation. We presume that a judgment or order of the trial court is correct (*People v. Giordano* (2007) 42 Cal.4th 644, 666), and the moving party bears the burden of demonstrating error on appeal (*People v. Gamache* (2010) 48 Cal.4th 347, 378; *People v. White Eagle* (1996) 48 Cal.App.4th 1511, 1523; *People v. Clifton* (1969) 270 Cal.App.2d 860, 862). As to this claim, defendant identifies neither a legal basis for the asserted error nor any prejudice to him. Given defendant's failure to identify the legal basis for his claim and our inability to discern any prejudice flowing therefrom, defendant's claim fails.

IV. Ineffective Assistance of Counsel at Sentencing

Finally, defendant argues that trial counsel rendered ineffective assistance of counsel at the sentencing hearing by pursuing a line of questioning that portrayed, or attempted to portray, the victim negatively. Defendant contends that had counsel not pursued that line of questioning, "there is a very real possibility the court would have either sentenced [him] to probation, or would have stayed the five (5) year enhancement." We are unpersuaded.

"In order to establish a claim for ineffective assistance of counsel, a defendant must show that his or her counsel's performance was deficient and that the defendant suffered prejudice as a result of such deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687–692.) To demonstrate deficient performance, [the] defendant bears the burden of showing that counsel's performance '"'"'fell below an objective standard of reasonableness … under prevailing professional norms.'"'"' (*People v. Lopez* (2008) 42 Cal.4th 960, 966.) To demonstrate prejudice, [the] defendant bears the burden of showing a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. (*Ibid.*; *In re Harris* (1993) 5 Cal.4th 813, 833.)" (*People v. Mickel* (2016) 2 Cal.5th 181, 198.)

"On appeal, we do not second-guess trial counsel's reasonable tactical decisions." (*People v. Lucas* (2014) 60 Cal.4th 153, 278, disapproved on another ground in *People v. Romero and Self* (2015) 62 Cal.4th 1, 53, fn. 19.) "[A] defendant's burden [is] 'difficult to carry on direct appeal,' as a reviewing court will reverse a conviction based on ineffective assistance of counsel on direct appeal only if there is affirmative evidence that counsel had '"'no rational tactical purpose"'" for an action or omission." (*People v. Mickel, supra,* 2 Cal.5th at p. 198, quoting *People v. Lucas* (1995) 12 Cal.4th 415, 437.)

Defendant has not shown the absence of *any* rational tactical purpose for pursuing the line of questioning challenged here. Regardless, even if we assume counsel erred, defendant fails to show any prejudice.

The victim in this case suffered catastrophic injuries and the extent of her injuries was not a contested issue. The trial court stated that the victim's character was irrelevant, in acknowledgment of counsel's argument, and it expressly identified her grave injuries as the "overwhelming" factor in denying defendant's request for probation. However, the court selected the lower term, finding there were no factors in aggravation and noting defendant's lack of a prior record and his remorse. Inasmuch as the injury to the victim was pivotal to the court's determination and trial counsel's line of questioning relating to the victim's character had no bearing on that factor, defendant has not met his burden of showing "a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different." (*People v. Mickel, supra,* 2 Cal.5th at p. 198.) Therefore, we reject his claim of ineffective assistance of counsel.

V. Correction of Technical Error on Count 3

We have the authority to correct clerical errors on our own motion. (§ 1260; *People v. Mitchell* (2001) 26 Cal.4th 181, 185; *In re Candelario* (1970) 3 Cal.3d 702, 705–706; *People v. Amaya* (2015) 239 Cal.App.4th 379, 385.) As previously set forth, in 2014, defendant was charged in count 3 with driving under the combined influence of alcohol and drugs, in violation of Vehicle Code section 23153, former subdivision (f).

The statute was subsequently amended in 2017 and subdivision (f) was renumbered to subdivision (g). (Stats. 2016, ch. 765, § 2.) This amendment was overlooked by the parties and the trial court and, as a result, defendant pled no contest to and was sentenced for driving under the combined influence of alcohol and drugs, in violation of Vehicle Code section 23153, subdivision (f).

The record clearly demonstrates that this was merely a technical, or clerical, error that was unrelated to the trial court's deliberate exercise of its judicial discretion and did not affect the parties' substantial rights. (*In re Candelario*, *supra*, 3 Cal.3d at pp. 705–706.) Accordingly, we shall order correction of the error.

DISPOSITION

As to defendant's claim the trial court erred in failing to investigate a conflict of interest arising from trial counsel's previous representation of the victim, defendant's appeal is dismissed for failure to obtain a certificate of probable cause. In addition, the trial court is directed to correct its records to reflect that defendant was convicted on count 3 of driving under the combined influence of alcohol and drugs, in violation of Vehicle Code section 23153, subdivision (g); and to prepare an amended abstract of judgment reflecting this correction and forward a certified copy to the appropriate authorities. Except as modified, the judgment is affirmed.

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MEEHAN, Acting P.J.

WE CONCUR:

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SNAUFFER, J.

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DESANTOS, J.